Lim Oh & Ors v Allen & Gledhill (sued as a firm)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-251 OF 1994
SHAIK DAUD, ABU MANSOR AND ABDUL MALEK AHMAD JJCA
7 OCTOBER 1998

Civil Procedure *— Amendment — Writ and statement of claim — Amendment to include respondent as party — Failure to affect amendment in 14 days — Amended writ and statement of claim allowed to be set aside — Appellants filed fresh writ and statement of claim — Whether res judicata applied to second suit — Whether filing of second suit an abuse of the process of court*

The appellants filed an action ('the first suit') against a legal assistant of the respondent for his conduct in handling the purchase of land which resulted in losses to the appellants. The appellants applied to amend the writ of summons and statement of claim to include the present respondent as a party to the action, and this was granted by the court. The appellants were required to effect the amendments within 14 days from the date the order was made but they failed to do this and there was no application for extension of the period. The appellants later filed a similar application but again failed to affect the amendments within 14 days. The appellants admitted that the amendments were eventually effected four months after the stipulated period without any application being made for an extension of time.

Pursuant to such failure, the respondent applied to set aside the amended writ of summons and statement of claim, and the application was allowed by the senior assistant registrar. Instead of appealing against the senior assistant registrar's order, the appellants filed a fresh writ of summons and statement of claim against the respondent ('the second suit'). The respondent argued that res judicata would apply and that the filing of the second suit constitutes an abuse of the process of the court. The senior assistant registrar allowed the second suit to be set aside. The judge dismissed the appellants' appeal against the senior assistant registrar's decision to strike out the second suit. The appellants appealed against the judge's decision.

Held, dismissing the appeal:

(1) For issue estoppel to apply, it is not necessary for the issue to be decided on its merits. Once a point is determined and a judicial decision is final on that point, then it ought not to be allowed to be ventilated in a fresh or new suit. The issue in the first suit was to make the respondent a party to the action. The judge came to a finding that the issue of making the respondent a party to the action has been finally decided, and that the only purpose of filing the second suit was also to make the respondent a party as the statements of claim in both suits were the same. The judge was correct in finding that issue estoppel applied (see p 649C–G).

(2) After filing the second suit and obtaining an order for its amendments, the amendments were effected out of the prescribed period. When faced with the application to set aside the first suit, the appellants again failed to apply for an extension of time to effect the amendments. This raised the presumption that the appellant failed to comply with the rules of court. When the order striking out the first suit was made, the appellants failed to appeal. The appellants felt that they could circumvent the need to appeal by instituting the second suit. Therefore, the filing of the second suit was an abuse of the process of the court (see p 650B–C).

[**Bahasa Malaysia summary**

Perayu-perayu telah memfailkan satu tindakan ('guaman pertama') terhadap seorang pembantu undang-undang yang berkhidmat dengan penentang berhubung dengan pengendalian pembelian tanah yang telah menyebabkan perayu-perayu mengalami kerugian. Perayu-perayu memohon untuk membuat pindaan kepada writ saman dan pernyataan tuntutan bagi tujuan memasukkan penentang sekarang sebagai satu pihak dalam tindakan, dan ini telah dibenarkan oleh mahkamah. Perayu-perayu dikehendaki membuat pindaan dalam masa 14 dari tarikh perintah dibuat tetapi mereka telah gagal berbuat demikian dan tidak terdapat permohonan untuk melanjutkan tempoh. Perayu-perayu kemudiannya memfailkan permohonan yang sama tetapi sekali lagi gagal membuat pindaan dalam tempoh 14 hari. Perayu-perayu mengakui bahahwa pindaan akhirnya dibuat empat bulan selepas tempoh yang ditetapkan tanpa sebarang permohonan dibuat untuk perlanjutan tempoh.

Berikutan kegagalan ini, penentang telah membuat permohonan untuk mengetepikan writ saman dan pernyataan tuntutan terpinda dan permohonan dibenarkan oleh penolong kanan pendaftar. Perayu-perayu telah tidak merayu terhadap perintah penolong kanan pendaftar tetapi sebaliknya telah memfailkan writ saman dan pernyataan tuntutan yang baru terhadap penentang ('guaman kedua'). Penentang berhujah bahawa res judicata akan terpakai dan bahawa pemfailan guaman kedua merupakan satu penyalahgunaan proses mahkamah. Penolong kanan pendaftar membenarkan guaman kedua diketepikan. Hakim menolak rayuan perayu-perayu terhadap keputusan penolong kanan pendaftar untuk membatalkan guaman kedua. Perayu-perayu membuat rayuan terhadap keputusan hakim.

Diputuskan, menolak rayuan:

(1) Untuk isu estopel terpakai, adalah tidak perlu untuk isu diputuskan atas merit. Sebaik sahaja suatu hujah diputuskan dan keputusan kehakiman adalah muktamad atas hujah tersebut, maka ia tidak sepatutnya dibenarkan dibentangkan dalam guaman baru. Isu dalam guaman pertama ialah untuk memasukkan

penentang sebagai satu pihak dalam tindakan. Hakim mencapai keputusan bahawa isu menjadikan penentang sebagai satu pihak dalam tindakan telah diputuskan secara muktamad, dan bahawa satu-satunya tujuan memfailkan guaman kedua adalah untuk menjadikan penentang sebagai satu pihak oleh kerana pernyataan tuntutan dalam kedua-dua guaman adalah sama. Hakim adalah betul dalam memutuskan bahawa isu estopel terpakai (lihat ms 649C–G).

(2) Selepas memfailkan guaman kedua dan mendapatkan perintah untuk membuat pindaan, pindaan-pindaan telah dibuat di luar tempoh yang ditetapkan. Apabila berhadapan dengan permohonan untuk mengetepikan guaman pertama, perayu-perayu sekali lagi gagal memohon perlanjutan masa untuk membuat pindaan-pindaan tersebut. Ini membangkitkan anggapan bahawa perayu telah gagal mematuhi kaedah-kaedah mahkamah. Apabila perintah yang membatalkan guaman pertama dibuat, perayu-perayu telah gagal membuat rayuan. Perayu-perayu beranggapan yang mereka dapat memintasi keperluan untuk merayu dengan memulakan guaman kedua. Oleh itu, pemfailan guaman kedua merupakan suatu penyalahgunaan proses mahkamah (lihat ms 650B–C).]

Notes

For a case on amendment of writ and statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 345.

Cases referred to

Carl-Zeiss-Stiftung v Rayner and Keeler Ltd & Ors (No 2) [1966] 2 All ER 536 (refd)

Janov v Morris [1981] 3 All ER 780 (refd)

Legislation referred to

Rules of the High Court 1980 O 15 r 8(1)

Appeal from: Civil Suit No S1–22–102 of 1991 (High Court, Kuala Lumpur)

CT Lee (*Fernandez & Co*) for the appellants.

Jennifer Chandran (*Chin Yew Meng* with her) (*Allen & Gledhill*) for the respondent.

Shaik Daud JCA (delivering judgment of the court): This is an appeal from the decision of the High Court which had, on 28 September 1994, affirmed the decision of the senior assistant registrar to set aside the writ of summons and statement of claim of the appellant on the ground that the action was res judicata and also frivolous and vexatious and an abuse of the process of the court.

On 2 May 1986, the appellants filed an action in the High Court ('the first suit') against one Low Kim Soon, a former legal assistant of the respondent and Scotch Leasing Sdn Bhd, involving the alleged conduct of the said Low Kim Soon in handling the purchase of land resulting in alleged losses to the appellants. Some two years later, on 13 June 1988, the appellants filed an application to amend the writ of summons and statement of claim to include the present respondent as a party to the action. It is rather strange why the appellants, if they thought they had a cause of action, never thought to include the present respondent in the first suit but only did so two years later. The appellants' application, however, was granted by the court on 24 January 1990. Now having obtained the order and by virtue of O 15 r 8(1) of the Rules of the High Court 1980 ('the RHC'), the appellants are required to affect the amendments within 14 days from the date the order was made, failing which the order would cease to have effect, without prejudice to the power of the court to extend the period. The appellants failed to do this within the stipulated period and there was no application for the extension of the period.

Arising out of this failure as aforesaid, the appellants, once again by a summons in chambers dated 20 March 1990, filed another similar application. This second application was granted on 7 June 1990. Again, the appellants failed to affect the amendments within the stipulated period of 14 days from 7 June 1990. The amendments were eventually effected on 15 October 1990, four months after the stipulated period, without any application being made for an extension of time. This was in fact conceded to by the appellants. (See p 85 of the appeal records.)

Pursuant to such failure, the respondent by summons in chambers dated 27 November 1990 applied to set aside the amended writ of summons and statement of claim, and on 16 January 1991, the respondent's application was allowed by the senior assistant registrar. The appellants did not appeal against the senior assistant registrar's order, further evidence of their concession that they were indeed out of time. Instead, the appellants filed a fresh writ of summons and statement of claim against the respondent ('the second suit').

The respondent entered conditional appearance to the second suit on 22 March 1991 and on the same date also filed an application to set aside the second suit on the grounds that res judicata would apply and that the filing of the second suit constitutes an abuse of the process of the court. On 3 April 1991, the learned senior assistant registrar allowed the respondent's application. Not being satisfied with the learned senior assistant registrar's decision, the appellants appealed to the (then) Supreme Court which allowed the appeal but ordered that the appeal to the judge in chambers be reheard by another judge. The matter was heard by another judge and he dismissed the appellants' appeal with costs against the learned senior assistant registrar's decision to strike out the second suit on the ground that issue estoppel applied and that the filing of the second suit constituted an abuse of the process of the court.

Learned counsel for the appellants argued that as the matter was never decided on its merits, issue estoppel does not apply. He argued that when

A the appellants' amended writ was set aside, that decision was not based on merits but rather on a procedural mistake of the appellants' failure to file the amended writ of summons and statement of claim within the stipulated time pursuant to O 15 r 8(1) of the RHC.

Learned counsel for the respondent submitted that as the appellants
B failed to appeal against the learned senior assistant registrar's decision in the first suit which was within their right to do so, they are now barred and estopped from filing this second suit based on the same cause of action.

After considering the arguments and the authorities cited, we agree with the learned judge's finding that issue estoppel applies in this case. It is
C our view that for issue estoppel to apply, it was not necessary for the issue to be decided on its merits. Once a point is distinctly put in issue and determined and a judicial decision is final on that point, then it ought not to be allowed to be ventilated in a fresh or new suit. We are fortified in this respect by the words of Lord Guest in *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd & Ors (No 2)* [1966] 2 All ER 536 at p 565 when he said:

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> What the learned judge did say in his judgment was, we quote, no doubt the giving of leave to defend cannot be said to be final judgment but in respect of issue estoppel the question is not whether there is a judgment that is final but whether the issue that was adjudicated on was disposed of with finality.

We found that the issue in the first suit was to make the respondent a party
E to the action. The appellant failed to do that because of their failure to comply with prescribed rules. The learned senior assistant registrar decided that in the light of such failure, the amended writ ought to be set aside and he accordingly set it aside. The appellant chose not to appeal against that decision. The learned judge came to a finding that the issue of making the
F respondent a party to the action has been finally decided, and that the only purpose of filing the second suit was also to make the respondent a party as the statements of claim in both suits are the same. It was on this premise that the learned judge held that issue estoppel applied and the commencement of the second suit was an abuse of the process of the court. We agree with that finding. In *Janov v Morris* [1981] 3 All ER 780
G where the plaintiff brought an action against the defendant for breach of contract, there was unexplained delay by the plaintiff in proceeding with the action and the action was ordered to be dismissed for want of prosecution unless the plaintiff served a summons for directions by 1 April 1980. The plaintiff failed to comply with the order. On 2 July 1980, the action was dismissed. On 9 September 1980, the plaintiff brought a second action
H against the defendant, raising the same cause of action as in the first action. On the application of the defendant, the second suit was struck out, it being held to be an abuse of the process of the court. On appeal, the judge in chambers allowed the appeal. The defendant appealed to the Court of Appeal. Watkins LJ at p 785 said:

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> In the event of his action being ordered to be struck out for failure to obey a peremptory order, he may appeal against that order seeking, if necessary, an extension of time within which to do so. The outcome of such an appeal will to some extent depend on the excuse for failure preferably set forth in

affidavit form provided for the court's consideration. If a litigant neglects to avail himself of that procedure and brings a fresh but precisely similar action to that ordered to be struck out, without any explanation then or at any later time for a failure to obey the peremptory order, he should not be surprised that the commencement of second action is found to be an abuse of the process of the court and for that reason, it too is struck out.

We agree that the filing of the second suit was an abuse of the process of the court since after having filed the second suit and obtained an order for its amendments, the appellants had admitted that the amendments were effected out of the prescribed period. When faced with the application to set aside the first suit, the appellants again failed to apply for an extension of time to enable the amendments to be effected. This raises the presumption that the appellant failed to comply with the rules of court. When the order striking out the first suit was made, the appellants could have appealed but failed to do so. The appellants felt that they could circumvent the need to appeal by instituting the second suit.

For the above reasons, we dismissed the appeal with costs and ordered the deposit to go to the respondent on account of taxed costs.

Appeal dismissed.

Reported by David Lai